A **FAIZ KHAIRUDIN**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: W-05-18-2005]
C 2 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 16,944 grams cannabis - Appeal against conviction and death sentence - Whether there was discrepancy in weight of drugs -* D *Whether there was evidence of direct trafficking - Whether non-calling of informer as witness fatal to prosecution case - Whether non-production of money used for purchase of drugs prejudicial to appellant*

The appellant was convicted and sentenced to death for trafficking E in 16,944 grams of cannabis under s. 39B(1)(a) for an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952. The appellant was arrested following a police trap set up with an agent provocateur ('PW9') who dealt with him in a drug transaction. The agent provocateur was a narcotics officer who F had earlier received information from an informer about the appellant's drug trafficking activity.

In the trial, the appellant denied the following: (1) that he knew the contents of the bag that contained the cannabis; (2) that he had a discussion with PW9 for the supply of the drugs; and (3) G that PW9 had shown him the money to purchase the drug.

In this appeal, the issues were: (1) whether there was discrepancy in the weight of the drugs as the first charge, the amended charge and the chemist in evidence each stated the weight as 17,600 H grams, 16,944 grams and 17,191 grams respectively; (2) whether there was no evidence of direct trafficking; (3) whether there was failure to call the informer as witness; and (4) whether the non-production of the money purportedly used to purchase the drugs led to an adverse inference under s. 114(g) of the Evidence Act I 1950.

Held (dismissing the appeal):
Per Hasan Lah JCA delivering the judgment of the court:

(1) The discrepancy in weight could be easily explained from the available evidence. The chemist in evidence gave 17,191 grams as the gross weight of the drug whilst the weight of 16,944 grams given in the amended charge was its net weight. The weight given in the original charge was before the drug was sent to the chemist for analysis. (para 26)

(2) There was no merit in the appellant's submission that there was contradictory evidence with regard to the drug exhibits. The evidence was clear that the same 18 packets of compressed slabs recovered from the impugned car were the same produced and tendered later in court. There was therefore no doubt as to the identity of the drug exhibits and therefore there was no break in the chain of evidence relating to the drug exhibits. (para 29)

(3) Based on the evidence and the principle of law stated in *Wan Marzuki Wan Abdullah*, the sale of the drug was complete notwithstanding there was no payment made by PW9 to the appellant. The acts of the appellant in bringing the drug to PW9's motor car after they had earlier agreed with the price of the drug when taken cumulatively constituted actual delivery. Therefore, there was no merit in the appellant's submission that there was no evidence of direct trafficking. (para 33)

(4) The informer did not play an active role in the present case except to introduce PW9 to the appellant. The informer was therefore protected under s. 40 of the Evidence Act 1950 and the non-calling of the informer by the prosecution was not fatal to the prosecution case. (para 37)

(5) It was unnecessary for the prosecution to produce and tender the money in the trial. The failure of the prosecution to produce the money did not prejudice the appellant as the money was not the subject matter of the offence. The non-production of the money had not caused any gap to the prosecution's case. (para 39)

(6) The appellant's defence was difficult to be believed and failed to raise any reasonable doubt in the prosecution's case. It followed that the trial judge was right in convicting the appellant for the offence of trafficking in the drug. (para 40)

[Conviction and sentence affirmed.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit atas kesalahan mengedar 16,944 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, satu kesalahan yang boleh dihukum di bawah s. 39B(2), dan telah dijatuhkan hukuman mati. Perayu ditangkap ekoran satu perangkap yang dibuat dengan bantuan seorang agen provokatur ('PW9') yang berurusan dengan perayu dalam satu transaksi dadah. Agen provokatur adalah seorang pegawai narkotik, yang sebelum itu menerima maklumat dari seorang informer berhubung kegiatan pengedaran dadah oleh perayu.

Di perbicaraan, perkara-perkara berikut telah dinafikan oleh perayu, iaitu: (1) bahawa beliau mengetahui kandungan beg yang mengandungi kanabis; (2) bahawa beliau terlibat dalam perbincangan dengan PW9 berhubung pembekalan dadah; dan (3) bahawa PW9 telah menunjukkan wang bagi pembelian dadah tersebut.

Dalam rayuan di sini, isu-isu yang berbangkit adalah: (1) sama ada terdapat percanggahan pada berat dadah memandangkan pertuduhan pertama, pertuduhan terpinda dan ahli kimia masing-masing menyatakan berat dadah sebagai 17,600 gram, 16,944 gram and 17,191 gram; (2) sama ada wujud keterangan tentang pengedaran terus; (3) sama ada terdapat kegagalan untuk memanggil informer sebagai saksi; dan (4) sama ada kegagalan mengemukakan wang yang dikatakan digunakan untuk membeli dadah membangkitkan inferens memudaratkan di bawah s. 114(g) Akta Keterangan 1950.

Diputuskan (menolak rayuan):
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Percanggahan pada berat dadah boleh dijelaskan dengan mudah dari keterangan yang ada. Ahli kimia dalam keterangannya memberikan angka 17,191 gram sebagai berat kasar dadah, sementara berat 16,944 gram yang dinyatakan

dalam pertuduhan terpinda adalah berat bersih dadah. Berat yang dinyatakan dalam pertuduhan asal adalah berat dadah sebelum dihantar kepada ahli kimia untuk analisa.

(2) Hujah perayu bahawa terdapat percanggahan keterangan pada eksibit-eksibit dadah adalah tidak bermerit. Keterangan adalah jelas bahawa 18 paket kepingan mampat yang ditemui dari dalam kereta adalah paket yang sama yang dikemukakan di mahkamah kemudiannya. Oleh itu, tiada keraguan pada identiti eksibit dadah, yang bermakna tiada lompang pada rantaian keterangan mengenai eksibit dadah.

(3) Berdasarkan keterangan dan prinsip undang-undang seperti yang dinyatakan di dalam Wan Marzuki Wan Abdullah, penjualan dadah telah sempurna walaupun tiada bayaran dibuat oleh PW9 kepada perayu. Tindakan perayu dalam membawa dadah ke kereta PW9 selepas mereka sebelum itu bersetuju mengenai harga dadah, dilihat secara kumulatif, adalah suatu penghantaran sebenar. Oleh itu, tiada merit pada hujah perayu bahawa tidak wujud pengedaran dadah secara terus.

(4) Informer dalam kes ini tidak memainkan peranan yang aktif selain dari memperkenalkan PW9 kepada perayu. Informer dengan itu adalah dilindungi di bawah s. 40 Akta Keterangan 1950, dan kegagalan memanggilnya sebagai saksi tidaklah fatal kepada kes pendakwaan.

(5) Adalah tidak perlu bagi pendakwaan untuk mengemukakan wang di perbicaraan. Kegagalan pendakwaan untuk mengemukakan wang tidak memprejudis perayu kerana wang bukan merupakan halperkara kesalahan. Ketidak-kemukaan wang juga tidak mewujudkan apa-apa lompang pada kes pendakwaan.

(6) Pembelaan perayu sukar untuk dipercayai dan tidak membangkitkan keraguan munasabah terhadap kes pendakwaan. Ianya mengikut bahawa hakim bicara betul dalam mensabitkan perayu bagi kesalahan mengedar dadah.

[Sabitan dan hukuman disahkan.]

Case(s) referred to:
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Wan Mazuki Wan Abdullah v. PP (Rayuan Jenayah No: 05-56-2008 (T)) (Unreported) ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2), 40, 40A
Evidence Act 1950, s. 114(g)

For the appellant - Ahmad Zaharil; M/s AM Zaharil & Co
For the respondent - Ahmad Bache DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-54-2001]

[Editor's note: For the High Court judgment, please see PP v. Faiz Khairudin [2005] 1 LNS 13.]

Reported by Usha Thiagarajah

JUDGMENT

Hasan Lah JCA:

[1] The appellant was charged at the Kuala Lumpur High Court for trafficking in dangerous drug, to wit, 16,944 grams of cannabis, on 10 April 2001 at the junction of Lorong Tuanku Abdul Rahman Kanan 5 and Jalan Haji Hussin, Kuala Lumpur under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). He was convicted and sentenced to death.

[2] The appellant appealed against the decision of the learned trial judge. We heard his appeal and dismissed it. We now give the grounds of our decision.

[3] The brief facts are these. On 4 April 2001 DSM Busra Abd. Kadir (PW9) who was attached to the Narcotics Department, Perak, received information from his informer about drugs trafficking activity by a male Malay by the name of Faiz in Kuala Lumpur. He informed his superior, ASP Hamdan bin Majid (PW12), about the information received. PW12 then asked PW9 to become the agent provocateur and instructed him to contact the informer to call Faiz and to arrange for a meeting between PW9 and Faiz. The informer informed PW9 later that Faiz agreed to meet him. On 9 April 2001 at about 4pm, PW9 and the informer left for Kuala Lumpur.

[4] At about 9pm PW9 and the informer arrived at Restoran Sri Shalimar, Jalan Tuanku Abdul Rahman, Kuala Lumpur. PW9 instructed the informer to contact Faiz and inform him that they were at the restaurant. Faiz told them to wait for him there. A

[5] About 5 to 10 minutes later two men came to meet them. The informer introduced PW9 to one of them who then introduced himself as Faiz. PW9 introduced himself to Faiz as 'Bob'. Faiz was the appellant. The appellant then introduced his friend to PW9 as Mohd. Noor. B

[6] Inside the restaurant the appellant and PW9 discussed about the supply of cannabis. All of them were seated at a table but the informer and Mohd Noor were seated further away from PW9 and the appellant. The informer and Mohd Noor did not take part in the discussion. In the discussion the appellant agreed to supply PW9 20 kilograms of cannabis at a price of RM1,200 per kilogram. The appellant asked PW9 to collect the cannabis from him the following day ie, 10 April 2001. C D

[7] The appellant told PW9 that he was staying at the 4th Floor, Wisma Hock Ann. The appellant also gave his mobile phone no. 019-3711-333 to PW9. They were in the restaurant for about 40 minutes. After that PW9 and the informer went back to Ipoh. E

[8] On 10 April 2001 at about 5pm, PW9, together with a police team headed by PW12, left for Kuala Lumpur. They arrived at the Hotel Grand Pacific, Kuala Lumpur at about 8.30pm. At about 9.45pm PW12 briefed his men of their duties in the raid. Besides PW9, Det. Sergeant Zainal Ahmad (PW11) was also asked by PW12 to do undercover job and to accompany PW9. PW9 was given RM17,000 by PW12. F G

[9] At about 10.05pm PW9 received a call from the appellant. Upon hearing this PW12 sprung into action. He instructed his men to take their position within the vicinity of Wisma Hock Ann and Restoran Sri Shalimar. PW9 and PW11 went to Restoran Sri Shalimar in a Honda Accord motor car bearing registration number WDN 8289. PW9 drove the car. They arrived there at about 10.30pm. PW9 left PW11 in the car and PW9 went into the restaurant. The appellant was already there. PW9 brought the appellant to his car and introduced PW11 to the appellant. PW9 showed the money to the appellant and told the appellant that he had RM24,000 with him. H I

[10] The appellant then asked PW9 to go with him to get the cannabis. PW9 drove the Honda Accord car with the appellant as his passenger. The appellant gave him the directions to the place where PW9 was supposed to take the cannabis. Before that PW5 handed the money to PW11 and PW9 told PW11 to wait for him at Jalan Chow Kit.

[11] On the way, the appellant asked PW9 to enter Lorong Tuanku Abdul Rahman 5 and then they arrived at Wisma Hock Ann. The appellant then got out of the car and went to Wisma Hock Ann Flat. About 10 to 15 minutes later the appellant came down from the flat carrying a black bag over his right shoulder. The appellant open the rear door of the Honda Accord car and put the black bag on the rear seat. The appellant then went to sit at the front passenger's seat, next to PW9.

[12] PW9 checked the black bag and he saw compressed slabs of plant material which he suspected to be cannabis.

[13] The appellant told PW9 to drive out through the same Lorong Tuanku Abdul Rahman 5. On arrival at the junction of Lorong Tuanku Abdul Rahman Kanan 5 and Jalan Haji Hussin PW9 stopped the car. At the same time his car was blocked by PW12's car and the appellant was arrested by PW12 and his men. PW12 seized the black bag which was on the rear passenger seat. Inside the bag PW12 found 18 compressed slabs wrapped with transparent plastics, which PW12 suspected to be cannabis.

[14] PW12 handed over the drug exhibits and the bag, together with the appellant to the Investigating Officer, Chief Inspector Rozeni bin Ismail (PW4) at the Dang Wangi Police Station at about 1.40am on 11 April 2001. On 16 April 2001 PW4 sent the drug exhibits to the Government Chemist, Nazarudin bin Mohamad (PW8) at the Chemistry Department, Petaling Jaya, for analysis.

[15] After analysing the drug exhs. PW8 found that the 18 compressed slabs were cannabis as defined under s. 2 of the Act with a nett weight of 16,944 grams.

Case For The Defence

[16] In his defence the appellant testified that he was introduced to PW9 by his brother's friend by the name of Nazri. The appellant claimed that Nazri was the informer in this case. The

appellant claimed that on 9 April 2001 when they met at Restoran Sri Shalimar he did not discuss the supply of cannabis with PW9. He only asked PW9's name. He claimed that it was Mohd Noor who spoke with PW9.

[17] The appellant claimed that Nazri had slept at his house for two nights ie, on 8 April 2001 and 9 April 2001. On 8 April 2001 Nazri did not bring anything with him. The appellant claimed that on 9 April Nazri brought with him the black bag to his house and left the bag there.

[18] According to the appellant, in the evening of 10 April 2001, the appellant called Nazri and asked him whether he wanted to come to his house to take the bag. Nazri told him that he would be coming to his house.

[19] At about 10pm the appellant received a call from PW9, who used Nazri's mobile phone. PW9 asked the appellant to meet him at Restoran Sri Shalimar. After he met PW9 at the restaurant, PW9 asked him about Nazri's bag. PW9 then asked the appellant to go to the appellant's house in PW9's car to get Nazri's bag. They then went to take the bag at the appellant's house. They were arrested while they were in PW9's car after he had taken the bag from his house.

[20] The appellant denied he knew the contents of the bag. He also denied that he had a discussion with PW9 for the supply of 20 kilograms of cannabis on 9 April 2001. He also denied that PW9 had shown him the money.

Finding Of The Learned Trial Judge

[21] The learned trial judge accepted the evidence of PW9 that there was negotiation between PW9 and the appellant for the supply of the cannabis. On the evidence available the learned trial judge held that the sale transaction of the proscribed drug had been completed. The learned trial judge ruled that based on the direct evidence of trafficking a *prima facie* case had been proved against the appellant. In his judgment the learned trial judge ruled:

> Di akhir kes pihak pendakwaan saya telah memutuskan bahawa keterangan kesnya telah berjaya menimbulkan satu kes *prima facie* terhadap tertuduh mengikut prinsip penilaian maksimum terhadap keterangan pendakwaan yang diputuskan dalam kes *Looi Kow Chai*

A *v. PP* [2003] 2 MLJ 65. Saya juga menerima sebulatnya keterangan SP9 yang bertindak sebagai agent provocateur dalam kes ini untuk memerangkap tertuduh. Keterangan SP9 adalah jelas dan tidak dapat digoyang di peringkat pemeriksaan balas. Keterangan seseorang agent provocateur seharusnya diterima di bawah s. 40 ADB 1952 dan tidak memerlukan apa-apa keterangan sokongan. Sila lihat kes-kes:

B

(i) *Namasiyiam & Ors. v. PP* [1987] 2 MLJ 336

...

C Dalam kata lain, keterangan langsung yang boleh dipercayai mencukupi untuk pembuktian kes *prima facie* dan tertuduh diperlukan menjawab pertuduhan terhadapnya ini.

[22] The learned trial judge rejected the appellant's defence and held that the defence was an afterthought and a bare denial. The learned trial judge held that the appellant's explanation that it was PW9 who called him and asked him to bring the bag left by Nazri at his house was not credible. The learned trial judge found it rather strange for PW9 to call the appellant and not Nazri as the bag belonged to Nazri and the appellant just met SP9 recently. The appellant also did not check with Nazri to find out whether what was said by PW9 was true or not.

[23] The learned trial judge held that the defence failed to raise any reasonable doubt in the prosecution case and the prosecution had therefore proved its case against the appellant beyond reasonable doubt.

The Appeal

[24] In the appeal before us learned counsel for the appellant submitted on four main issues, namely:

(a) discrepancy in the weight of the proscribed drug;

(b) no evidence of direct trafficking;

(c) non-calling of the informer; and

(d) non-production of the money (RM17,000).

Discrepancy In The Weight Of The Proscribed Drug

[25] Learned counsel for the appellant submitted that when the appellant was first charged the weight of the cannabis stated in the charge, which can be found at p. 3 of the appeal record, was 17,600 grams. In the amended charge (p. 4 of the appeal record) the weight of the cannabis stated therein was 16,944 grams. However when PW8, the chemist, gave evidence he said the weight of the drug was 17,191 grams.

[26] We have carefully considered the evidence given by the relevant witnesses for the prosecution relating to this and with respect to learned counsel for the appellant, we were unable to agree with him. The discrepancy in weight could be easily explained from the evidence available. At p. 47 of the appeal record PW8 mentioned about the gross weight of the proscribed drug. The weight of the proscribed drug given in the amended charge, which was 16,944 grams was the nett weight. The weight given in the original charge was before the proscribed drug was sent to PW8 for analysis. The charge sheet at p. 2 of the appeal record shows that the appellant was first charged in court on 23 April 2001.

[27] PW4 received the drug exhibits from PW12 on 11 April 2001. He then sent the drug exhibits to PW8 for analysis on 16 April 2001. He received the drug exhibits back from PW8 on 19 October 2001. The evidence showed that when the appellant was first charged in court the police had not received the chemist report from PW8. As such the weight given in the first charge was not the weight given by PW8. In his evidence (p. 34 of the appeal record), PW8 said the total nett weight of the cannabis was 16,944 grams. In exh. P1, the consent of the Public Prosecutor, the weight of the cannabis stated therein was also 16,944 grams.

[28] Learned counsel for the appellant further submitted that there was contradiction in the evidence of PW12 and PW4 with regard to the drug exhibits. According to learned counsel PW4 testified he received 18 compressed slabs, each wrapped with a transparent plastic and tied with a red raffia string and cellophane tapes. However in PW12's evidence he only said the 18 compressed slabs were wrapped with transparent plastics.

[29] Again, with respect, we found no merit in the appellant's contention. PW12 testified that he marked the 18 plastic packets of compressed slabs with the word "HM/B/1 to HM/B/18", "Dang Wangi Report 9175/2001" and he initialled and wrote the date "10 April 2001" on each of the packet. In his evidence PW4 said he received the 18 packets of compressed slabs with the above markings from PW12 on 11 April 2001. Both PW4 and PW12 identified the 18 plastic packets which were produced and tendered in court. The evidence was therefore clear that the same 18 packets of compressed slabs recovered from the Honda Accord car by PW12 were given to PW4 and later produced and tendered in court. There was therefore no doubt in the identity of the drug exhibits and we were of the view that there was no break in the chain of evidence relating to the drug exhibits.

No Evidence Of Direct Trafficking

[30] Learned counsel for the appellant submitted that there was no evidence to support the learned trial judge's finding that the sale transaction of the proscribed drug had been completed by SP9 and the appellant. He argued that when the appellant was arrested the proscribed drug had not been delivered to PW9 by the appellant and PW9 had not paid for the drug to the appellant. What PW9 did was only to show the money to the appellant.

[31] In his judgment the learned trial judge made the following finding:

> Setelah memberi penilaian penuh terhadap keterangan SP9 saya memutuskan bahawa pihak pendakwaan telah berjaya membuktikan melalui keterangan langsung yang menunjukkan bahawa satu perbincangan telah berlaku di antara tertuduh dan SP9 bagi tujuan pembekalan dadah tersebut. Hasil daripada perbincangan mereka, SP9 telah menyediakan wang tunjuk sebanyak RM17,000 sebagai wang pembelian dadah tersebut dan tertuduh telah membekalkan dadah cannabis kepadanya seperti yang dipersetujui. Transaksi jual dan beli bagi saya telah berlangsung dan tidak perlu bayaran dibuat dahulu. Dalam kes *PP v. Mohamed Halipah* [1982] 1 MLJ 155, Hakim bijaksana berkata:
>
> > I am satisfied beyond reasonable doubt that the accused was selling 14.24 grammes of heroin and 3.62 grammes of morphine to DPC 57931 Zainal, who had acted as an agent provocateur, for a sum of $700. It is common knowledge that the "selling" and "buying" transaction is complete when the parties to such sale have made an offer to sell a

commodity at a certain price and the other has accepted such an offer at the said price. Thereafter it remains for the money to change hands which is not the vital part in the sale transaction for, a sale may yet be on complete credit.

Dalam kata lain, keterangan langsung yang boleh dipercayai mencukupi untuk pembuktian kes *prima facie* dan tertuduh diperlukan menjawab pertuduhan terhadapnya ini.

[32] The issue whether the sale of the proscribed drug had taken place when there was no actual delivery of the substance had been considered by the Federal Court in *Wan Mazuki bin Wan Abdullah v. Pendakwa Raya* (Rayuan Jenayah No. 05-56-2008 (T)). In that case, the Federal Court, after considering its judgment in *Public Prosecutor v. Sa'ari Jusoh* [2007] 2 CLJ 197, had this to say:

17. On cursory reading of the separate judgments given in *Sa'ari*'s *Jusoh* case *(supra)* one would get the impression that there was a divergence in opinion on the issue of delivery and the payment of the agreed price. However, on careful analysis both the judgments held the view that to constitute actual delivery it would not be necessary for the agreed price to be paid upon physical delivery of the drug itself. Thus, in the present case the non-payment of the agreed price should not mean that there was no actual delivery of the drug on the appointed day.

18. On the issue of 'actual delivery' the Court of Appeal in this present case said:

> In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery. (emphasis added).

A

19. We are entirely in agreement with the view expressed by the Court of Appeal on what constitutes 'actual delivery' thus elucidating the issue as earlier propounded in *Sa'ari Jusoh* case *(supra)*.

B

[33] On the evidence adduced in the instant appeal and the principle of law stated in *Wan Mazuki bin Wan Abdullah* we agreed with the finding of the learned trial judge that the sale of the proscribed drug was complete notwithstanding there was no payment made by PW9 to the appellant. The acts of the appellant in bringing the drug to PW9's motor car after they had agreed

C

with the price of the drug earlier when taken cumulatively constituted actual delivery. With respect to learned counsel, we found no merit in his argument on this issue.

Non-Calling Of The Informer

D

[34] The defence contended that the informer mentioned by PW9 in his evidence was Nazri. Learned counsel for the appellant submitted that the informer played an active role in the case and had in fact acted as an agent provocateur. In the present case the

E

informer was neither called nor offered to the defence. The informer was present when SP9 and the appellant met in Restoran Sri Shalimar and negotiated for the supply of the proscribed drug on 9 April 2001. The negotiation was done in the presence of the informer. Learned counsel for the appellant contended that the

F

prosecution's failure to call him as a witness attracted the adverse presumption rule under s. 114(g) of the Evidence Act 1950.

[35] The learned trial judge had ruled that the informer's role in this case was only to introduce SP9 to the appellant and as such

G

the prosecution did not have to call him as a witness for the prosecution.

[36] Sections 40 and 40A of the Act are provisions relating to agent provocateur and informer. The law relating to agent provocateur and informer has been discussed by the apex court

H

in a number of cases. In *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 the Federal Court made the following observation at pp. 28 and 29:

I

[15] The interpretation and the application of the above provisions of the Act have been discussed in a number of earlier decided cases. (See the cases of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 240, *PP v. Mansor Md Rashid & Anor.* [1997] 1 CLJ 233; *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; *Ghazalee Kassim & Ors. v. PP* [2009] 4 CLJ 737).

[16] From the decision of the above cited cases, the position in law in relation to ss. 40 and 40A of the Act is well settled and clear. The informer is protected from giving evidence whilst an agent provocateur is not protected. In other words, if a person is only an informer, the prosecution is not required to call him as a witness or offering him to the defence. An informer is protected under s. 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and made available to the defence. Failure to comply with this requirement will attract the application of adverse inference under s. 114(g) of the Evidence Act against the prosecution's case.

[17] The dispute in the present case is therefore centred on the status of the person called Seman. The question is whether Seman is to be treated as an informer or an agent provocateur. The prosecution contended that Seman is an informer, whilst the defence contended that Seman is an agent provocateur. In deciding on this issue useful reference may be made to the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 21, wherein Mohamed Azmi, SCJ in delivering the judgment of the Supreme Court had this to say:

> … In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instance case the protection under section 40(1) clearly applies since evidence showed all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under section 114(g).

And at p. 32 the Federal Court ruled that:

[23] The Federal Court in the above case ruled that based on the facts, the court would not invoke s. 114(g) of the Evidence Act. Similarly, it is my judgment in the present case that the non-calling or the non-offering of the informer by the prosecution had

A not caused any gap to the prosecution's case as it does not tend to explain the presence of the first appellant other than for the purpose of supplying the drugs to SP7. Therefore, Seman the informer in the present case is afforded the protection under s. 40 of the Act.

B **[37]** Similarly in the present case we found that the informer did not play an active role in this case except to introduce PW9 to the appellant. The informer was therefore protected under s. 40 of the Act and the non-calling of the informer by the prosecution was not fatal to the prosecution case.

C

Non Production Of The Money

[38] The money of RM17,000 was shown to the appellant by PW9 on 10 April 2001. The money was given by PW12 to PW9. D PW9's evidence was corroborated by PW11. Learned counsel for the appellant submitted that the non-production of the money had left a serious gap in the narrative of the prosecution's case. The failure of the prosecution to produce the money would result in the invocation of adverse inference under s. 114(g) of the E Evidence Act 1950 against the prosecution.

[39] With respect, we were unable to agree with the contention of learned counsel for the appellant. In our view, it was unnecessary for the prosecution to produce and tender the money in the trial. The failure of the prosecution to produce the money F did not prejudice the appellant as the money was not the subject-matter of the offence. The non-production of the money had not caused any gap to the prosecution's case.

Conclusion

G

[40] We had considered the defence put up by the appellant. The defence of the appellant was difficult to be believed. More importantly it failed to raise any reasonable doubt in the prosecution's case. We came to the conclusion that the learned H trial judge was right in convicting the appellant for the offence of trafficking in the proscribed drug.

[41] For the reasons given the appellant's appeal was dismissed. The conviction and sentence were affirmed.

I